UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA, FORT LAUDERDALE DIVISION

In re:	
RAYMOND T. HYER, JR.,	Chapter 11
Debtor,	Case No. 92-20777-BKC-RBR
In re:	Consolidated Case Numbers
GARDNER INDUSTRIES, INC.;	92-20779-BKC-RBR
GARDNER ASPHALT CORPORATION (NEW JERSEY);	92-20780-BKC-RBR
GARDNER INTERNATONAL OPERATIONS LIMITED;	92-20781-BKC-RBR
GAC TRANSCO, INC.;	92-20782-BKC-RBR
GARDNER-OVERALL, INC.;	92-20783-BKC-RBR
GAC-TRUCKING CO., INC;	92-20784-BKC-RBR
AMERICAN LAVA COATINGS CORP.	92-20785-BKC-RBR
APOC OF COLORADO, INC.;	92-20786-BKC-RBR
ASPHALT PRODUCTS OIL CORPORATION;	92-20787-BKC-RBR
GARDNER ASPHALT COMPANY;	92-30788-BKC-RBR
GARDNER ASPHALT CORPORATION (DELAWARE);	92-20789-BKC-RBR
GARDNER ASPHALT CORPORATION OF DELAWARE	92-20790-BKC-RBR
GARDNER ASPHALT, INC.,	92-20791-BKC-RBR
Debtors.	JOINTLY ADMINISTERED
UNITED STATES OF AMERICA	
Plaintiff,	
v.	ADV. NO. 02-2067
RAYMOND T. HYER, JR.; GARDNER ASPHALT CORPORATION; and EMULSON PRODUCTS COMPANY,	
Defendants.	

RESPONSE OF CORPORATE DEFENDANTS TO
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Gardner Asphalt Corporation ("GAC") and Emulsion Products Company ("EPC" and collectively with GAC, the "Corporate Defendants"), by and through their undersigned counsel and pursuant to Federal Rule of Civil Procedure 56 made applicable to this proceeding through Federal Rule of Bankruptcy Procedure 7056, hereby file their response (the "Response") to Plaintiff's motion for partial summary judgment as supported by Plaintiff's memorandum of law (collectively, the "Motion") and in support thereof represent as follows:

Background

1. GAC, twelve of its corporate affiliates, and Raymond T. Hyer, Jr. ("Hyer" and, collectively with the aforementioned entities, the "Debtors"), filed for bankruptcy protection under Chapter 11 of the *United States Bankruptcy Code*, 11 U.S.C. § 101 *et seq.*, on February 26, 1992 (these substantively consolidated proceedings shall be referred to collectively as the "Bankruptcy Case").

2. This Court confirmed the *Joint Plan of Reorganization Submitted by the Gardner Corporate Debtors, Raymond T. Hyer, Jr., and the Official Committee of Unsecured Creditors of the Gardner Corporate Debtors* (the "Plan") filed in the Bankruptcy Case through the entry of a confirmation order dated March 11, 1993, as amended by subsequent orders entered on May 28, 1993; June 11, 1993; June 30, 1993; and September 8, 1993 (collectively, the "Confirmation Order").

3. Although not a debtor in the aforementioned case, EPC, as a corporate affiliate of the debtors, did receive treatment under the confirmed Plan.

4. On September 28, 2001, the United States of America ("Plaintiff") filed a complaint against the Corporate Defendants, Raymond T. Hyer, Jr. ("Hyer"), and others in the United States District Court for the District of Delaware commencing the case of United States of America v. The Ed Krewatch Partnerships, et al., C.A. No. 01-659-GMS (the "Delaware Action"), seeking recovery of certain response costs under CERCLA, 42 U.S.C. § 9607(a), to reimburse the Environmental Protection Agency for certain clean-up costs incurred in connection with the so-called "Drum Burial Area" of the Krewatch Farm Site located near Seaford, Delaware.

5. In response to certain issues raised in connection with the relief provided through the confirmed Bankruptcy Case, Plaintiff has voluntarily stayed the Delaware Action until this Court resolves certain issues identified in this Court's *Order Granting Joint Motion for Continuance of Pretrial Conference and Related Pretrial Deadlines, Bifurcation, and for Determination of Issues to be Heard.*

6. Accordingly, on March 8, 2002, Plaintiff filed the complaint against the Corporate Defendants and Hyer which initiated this Adversary Proceeding to resolve the above-referenced issues.

Plaintiff's Motion for Partial Summary Judgment, the Memorandum, and the Supporting Exhibits

7. On or about June 21, 2002, Plaintiff filed a motion for partial summary judgment supported by the Memorandum.

8. The 41 page memorandum is divided into two primary sections entitled "Factual Background" and "Argument."[1]

9. The twelve page Factual Background section provides a detailed, if one-sided, account of certain facts relevant to this proceeding from the perspective of the United States. The Factual Background section is presumably included in the Memorandum to support the Plaintiff's attempt to obtain partial summary judgment and references 42 documents which are annexed to the Memorandum as Exhibits. The Corporate Defendants have filed a motion to strike (the "Motion to Strike") virtually all of these exhibits contemporaneously with this Response.

Issues Presented by Plaintiff for Summary Judgment

10. Plaintiff's Motion identifies six issues as being ripe for summary judgment; the following three issues pertain to the Corporate Defendants (as opposed to Defendant Hyer):

a. When did the United States' CERCLA claim (the "EPA Claim") arise against Emulsion?

b. When did the EPA Claim against Debtor Gardner Asphalt Corporation (New Jersey) arise?

c. In the event the EPA Claim against Emulsion, a non-debtor, arose prior to the filing of the Debtors' bankruptcy petitions, did Emulsion receive (1) a discharge under the Plan or (2) any other relief under the Plan or Confirmation Order precluding the United States from bringing the EPA Claim against Emulsion?

[1] Although the Corporate Defendants have not moved to strike the Memorandum on this ground, Plaintiff's lengthy memorandum contains more than twice the number of pages permitted under Local Rule 7.1(C)(2).

Applicable Legal Standard for Summary Judgment

11. Summary judgment should be granted only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law. Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987).

12. Issues of fact are "genuine" when the record of the case as a whole could lead a rational trier of fact to find for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U§. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

13. Issues are "material" if they might affect the overall outcome of the case under the governing law. Id.

14. On a motion for summary judgment, the Court must view the properly admissible evidence under Rule 56(e) in a light most favorable to the non-moving party. Griesel v. Hamlin, 963 F.2d 338, 341 (11th Cir. 1992).

Legal Argument

The Factual Record is Insufficient to Justify the Entry of Summary Judgment

15. For the reasons set forth in the Motion to Strike, the vast majority of the 42 documents which Plaintiff relied upon to set the factual background for its summary judgment motion are not admissible for that purpose under Rule 56(e), Federal Rules of Civil Procedure.

16. As described in greater detail below, the record in this case is not adequate in the absence of those voluminous exhibits for the Court to grant summary judgment on any of the three issues identified above.

Plaintiff's First Two Issues for Summary Judgment: When did the EPA Claim Arise?

17. Plaintiff's first two issues for summary judgment as set forth herein pertain to when the EPA Claim against EPC and GAC arose. The crucial issue is whether the claim arose before or after entry of the Confirmation Order; if the EPA Claim arose prior to the entry of the Confirmation Order the claim would properly have been discharged in 1993.

18. Pursuant to 11 U.S.C Section 1141, a discharge in bankruptcy discharges the debtor from all debts that arose prior to confirmation of a reorganization plan. A "debt" is defined as "liability on a claim." 11 U.S.C. § 101(12). A "claim" is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A).

19. The legislative history of the United States Bankrutpcy Code makes clear that Congress intended the term "claim" to have the "broadest possible definition... [including] all legal obligations of the debtor, no matter how remote or contingent." H.R. Rep. No. 95-595, at 649 (1977).

20. As noted by Plaintiff, there is tension between the underlying goals of the Bankruptcy Code, i.e., promoting a fresh start or a reorganization, and CERCLA, providing a method for the rapid and efficient remediation of major environmental

contamination. Bankruptcy Courts have often been called upon to resolve this tension and have jurisdiction to do so.

21. The threshold issue of when a CERCLA claim arises has been addressed by courts in various jurisdictions. The leading case considering this issue is In re Crystal Oil, 158 F.3rd 291 (5th Cir. 1998). Crystal Oil held that a CERCLA claim arises when a potential claimant could have ascertained through the exercise of reasonable diligence that it had a claim against a debtor. Id. at 296. For the reasons set forth below, the EPA Claim would certainly have arisen prior to the filing of the Bankrutpcy Case under the Crystal Oil Test.

22. Another seminal opinion considering this issue is In re Chicago, Milwaukee, St.Paul & Pacific Railroad, 974 F.2d 775 (7th Cir. 1992) ("Chicago I") which set forth a different standard for determining when a CERCLA claim arises for bankruptcy purposes. The court in Chicago I held that a CERCLA claim arises "when a potential CERCLA claimant can tie the bankruptcy debtor to a known release of a hazardous substance which the claimant knows will lead to CERCLA response costs..." *Id*. at 786.

23. Courts have also held that if there has been a release or threatened release of hazardous waste prepetition, the resulting CERCLA claim is dischargeable in bankruptcy. See In re Chateaugay Corp., 944 F.2d 997 (2nd Cir. 1991). In the case of In re National Gypsum Company, et al, 139 B.R. 397 (N.D. Tex. 1992), the court held that costs "based on prepetition conduct that can be fairly contemplated by the parties at the time of Debtors' bankruptcy are claims under the Code." Id., at 409.

24. Under any of the above mentioned methods for determining when the EPA Claim arose, the result must be the same: The EPA Claim against both GAC and EPC arose prepetition and certainly prior to the entry of the Confirmation Order. CERCLA applies whenever there is a release or a substantial threat of a release of a hazardous substance into the environment. *See* 42 U.S.C. Section 9604(a)(1)(A). The term "release" includes the "abandonment or discarding of barrels…containing any hazardous substance." See 42 U.S.C. Section 9601(22). Hence, there was a discharge of hazardous substances under CERCLA the moment the storage barrels were buried at the Krewatch Farm.

25. Based on the voluminous documents produced by Plaintiff in this proceeding, the Environmental Protection Agency ("EPA") knew that the barrels buried on the Krewatch Farm contained hazardous substances no later than 1988 when it received a site inspection from the Delaware Department of Natural Resources and Environmental Control ("DENREC"). In relevant part, this report states:

> In 1987, the U.S. EPA determined that more information was needed to conclude the site ranking. At that time, DENREC was assigned to conduct a Site Inspection encompassing the drum burial area and the drums stored on the site. The SI revealed elevated levels (120 to 190 ppm) of 4-methyl 2-pentanone (MIBK) in the soils of the drum burial area.
>
> Delaware Department of Natural Resources and Environmental Control, Report of Findings ("DENREC Report), Krewatch Farm Site, March 21, 1995, p.2.

It is clear that the report specifies the "drum burial area," which is the subject of this litigation, as opposed to the drum storage area, which is not at issue in this proceeding.

26. The substance mentioned in DENREC's report, 4-methyl 2-pentanone (MIBK), is a CERCLA "hazardous substance," according to the Adversary Complaint, Paragraph 46. Also, there are no quantitative requirements under CERCLA. See Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 669 (5th Cir. 1989); see also United States v. Alcan Aluminum Co., 990 F.2d 711, 720 (2nd Cir. 1993)("[CERCLA] on its face applies to 'any' hazardous substance, and it does not impose quantitative requirements").

27. Thus, as soon as EPA knew there had been a release of a hazardous substance at the Drum Burial Site, it was on actual notice of a CERCLA event. If the EPA then choose to ignore that event in favor of more pressing remediation problems or for any other reason, it cannot be heard to complain of the results of that decision many years after it could have initiated a thorough investigation and clean-up.

28. Plaintiff's argument that it had no knowledge of and could not have anticipated the seriousness of the contamination at the Drum Burial Area prior to the Corporate Debtors' bankruptcy is not only lacking in credibility but also irrelevant if the EPA had already incurred response costs prior to that date.[2]

---

[2] In 1985 the EPA contracted with Roy F. Weston, Inc. ("Weston") as a Technical Assistance Team ("TAT") contractor. See *DENREC Memorandum* dated May 1, 1985. Weston performed the following activities with regard to the Drum Burial Area: conducted magnetometer survey, dug trench with backhoe, visually assessed the contents of the drums, took and analyzed samples, and referred site to EPA's Site Investigation and Support Section. See Federal On Scene Coordinator's Report, Tharp Oil Spill, April 15, 1985-July 30, 1985, Section VII(D). Presumably, this work constituted the "[a]dditonal work [that] was subsequently performed using CERCLA funds to assess suspicious areas" of Krewatch Farm. *See id.* at Section II. Weston reported to the EPA that "several of the drums had obviously leaked their contents." Weston Memorandum dated June 1, 1987. The EPA not only knew that there would be response costs at the Drum Burial Area, but had already incurred them well before the Corporate Debtors filed for bankruptcy.

29. The term "response costs" includes such pre-cleanup costs as onsite testing and costs of investigation. See Chicago I, 974 F.2d at 787. See also Marriot Corp. v. Simkins Industries, Inc., 825 F.Supp. 1575, 1581 (S.D.Fla. 1993) (holding costs related to drilling, investigation, and analyzing soil samples to be response costs) citing Tanglewood East Homeowners v. Charles Thomas, Inc., 849 F.2d 1568, 1575 (5th Cir. 1988).

30. Plaintiff also asserts that it was not possible for EPA to identify the Corporate Debtors or Hyer in connection with the alleged release of hazardous substances at Krewatch Farm prior to the confirmation of the Bankruptcy Case. Again, this is simply not accurate. Well before the Corporate Debtors filed for bankruptcy, the EPA was in possession of information sufficient to identify the potentially responsible parties. Plaintiff admits that its investigators had linked the alleged release at Krewatch Farm to an asphalt plant in Seaford, Delaware far in advance of the filing of the Bankruptcy Case. Had the EPA obtained the name of EPC, the only asphalt company within two-hundred miles, from Tony Nero while it was interviewing him, it would have discovered the identities of Hyer and the Corporate Debtors in time to file a claim in the Bankruptcy Case.

31. In summary, the gravamen of Plaintiff's summary judgment argument with respect to the first two issues set forth above is that, as a matter of law and based on the existing record in this proceeding, the EPA did not know, and could not reasonably have been expected to know, of the potential EPA Claim against the Corporate Defendants prior to the entry of the Confirmation Order in the Bankruptcy Case.

32. However, the evidence before the Court simply does not support this contention; a conclusion which would be even more inescapable if the Motion to Strike is granted. Indeed, it is not disputed that (1) the EPA began its investigation into the relevant site in the early 1980s, (2) the EPA identified the source of the relevant contamination, i.e., certain buried drums, prior to the Debtors' petition date, (3) the contaminants match chemicals found at EPC's facility, (4) EPA traced the source of the contamination to an asphalt company in Seaford, Delaware, (5) the EPA was listed by the Debtors as having not one but ten unliquidated claims in the Bankruptcy Case, and (6) the Plaintiff received notice of the Bankruptcy Case on or about March 29, 1992 (almost a full year prior to confirmation of the Plan) through mailings sent to the EPA's offices in San Francisco, Atlanta, Dallas, Kansas City, Sacramento, Denver, Chicago, New York, and Philadelphia. *See*: *Notice of Commencement of Case* and attached mailing list; *Statement of Assets and Liabilities Schedules F to H*, pp. 256 – 257; and the *Affidavit of Sean W. Poole in support of Motion by Corporate Defendants for Partial Summary Judgment* – all as attached to the *Motion by Corporate Defendants for Partial Summary Judgment* previously filed with this Court.

33. The issue of when the EPA Claim arose with respect to the Corporate Defendants clearly raises genuine issues of material fact. Accordingly, these issues are not suitable for summary judgment.

Plaintiff's Third Issue for Summary Judgment: Protection for EPC under the Plan

34. Plaintiff alleges that because EPC was not a named debtor in the Bankruptcy Case, the EPA's claim against EPC, to the extent that it arose prior to the

confirmation of the Bankruptcy Case, cannot be affected by the terms of the Plan or the Confirmation Order.

35. While it is true that EPC was not a named debtor in the Bankruptcy Case, it is nonetheless entitled to protection through the injunctive provisions of the Confirmation Order and the applicable provisions of the Plan.

36. Under the Plan, EPC is included within the definition of the "Reorganized Company." Paragraph 94 at page 16 of the Plan states that the "Reorganized Company shall mean the Corporate Debtors, their affiliates, and any successors thereto after the Effective Date of the Plan." Pursuant to the definitions contained within the Plan, EPC is both an Affiliate and a Reorganized Affiliate; as such it is part of the Reorganized Company and entitled to certain protections afforded by the Plan as confirmed by the Confirmation Order.

37. Paragraph 2 at page 1 of the Plan defines "Affiliate," for purposes of the Plan, as having the same meaning as set forth in § 101(2) of the Bankruptcy Code. § 101(2)(B) of the Bankruptcy Code defines an affiliate as a:

> corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor.

In this case, EPC is an affiliate under both of the definitions set forth in Section 101(2)(B). When the Plan was confirmed, Hyer, a debtor, owned more than twenty percent of the stock in EPC. Additionally, Hyer controlled more than twenty percent of

Gardner Industries, Inc., another debtor, at the same time. Gardner Industries, Inc. was the sole shareholder of EPC as of the entry of the Confirmation Order. Since EPC was an Affiliate under either the direct test or the under-common-control-test of Section 101(2)(B) of the Bankruptcy Code, EPC is a Reorganized Affiliate under the operation of the Plan.

38. Page 95 of the Plan, paragraph E, provides for the treatment of subsidiaries and reorganized affiliates. Specifically, the Plan requires "that the same person shall be the Chief Financial Officer of the Reorganized Company, its subsidiaries, and its Reorganized Affiliates, including Sun Coatings, Inc., and Chemex, Inc., and of Emulsion Products Company." In addition to being an Affiliate and a Reorganized Affiliate under the Plan, EPC is also a successor and part of the Reorganized Debtor under paragraph 95, page 16, of the Plan.

39. The terms of the Confirmation Order further support the proposition that EPC is a successor falling within the definition of Reorganized Debtors. Paragraph 5 at pages 9-11 of the Confirmation Order provides that the Reorganized Company, and specifically EPC and certain other entities, shall execute a reorganization agreement and other documents. The Confirmation Order also provides that the Plan and the Confirmation Order are binding on the Reorganized Company, which by definition includes EPC. Confirmation Order, p. 11. Among the protections provided to the Reorganized Debtors, including EPC, under the terms of the Plan and the Confirmation Order is injunctive relief against the commencement of any action against any property of the Reorganized Debtors on account of any claim that is dealt with, discharged, waived,

or released by an order, the Bankruptcy Code, or the Plan. Confirmation Order, pp. 12-13.

40. Since EPC is a successor in interest to a debtor corporation, this Court retains jurisdiction over the liabilities of EPC under the terms of the Plan and the Confirmation Order. See Select Creations v. Paliafito Am., 852 F.Supp. 740 (Wis. 1994).

41. Similarly, since EPC is a successor, and protected under the Plan, Plaintiff's argument that "the court cannot discharge the United States' claims against EPC because claims against non-debtors can only be discharged where parties who would be enjoined from suing the non-debtors have received consideration under the plan" is not compelling. *See* Plaintiff's Memorandum, page 39.

42. Finally, plaintiff argues that the EPA had inadequate notice that EPC would receive a discharge under the Plan and that accordingly this Court cannot discharge the EPA's claims against the Corporate Debtors. This argument fails for the same reason that EPC is entitled to a discharge under the Plan: a straightforward application of the terms and definitions of the Plan and the Confirmation Order, both of which were provided to the EPA as scheduled creditors, would have provided Plaintiff with notice of the discharge and other relevant treatment of EPC.

ORIGINAL

WHEREFORE, the Corporate Defendants respectfully request that the Court (1) deny Plaintiff's motion for partial summary judgment as it pertains to the Corporate Defendants and (2) enter an order providing the Corporate Defendants with such additional relief as the Court deems just and appropriate under the circumstances.

Dated this 8th day of August, 2002.

LAW OFFICE OF HANS CHRISTIAN BEYER, P.A.

Hans Christian Beyer
1517 7th Avenue, Suite F
Tampa, FL 33605
FBN 0894087
Telephone: (813) 242-4402
Facsimile: (813) 242-0481
Attorney for Defendants Gardner Asphalt Corporation and Emulsion Products Company

R EPA MPSJ 8-Aug-02.doc

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and accurate copy of the foregoing *Response by Corporate Defendants to Plaintiff's Motion for Partial Summary Judgment* was served by facsimile transmission (202) 616-6583 on David E. Street, Senior Attorney, United States Department of Justice, Environmental Enforcement Section, Environment and Natural Resources Division, on August 8th, 2002, and by first class U.S. Mail, postage prepaid to David E. Street, Senior Attorney, United States Department of Justice, Environmental Enforcement Section, Environment and Natural Resources Division, P.O. Box 7611, Ben Franklin Station, Washington, D.C. 20044-7611, and by first class U.S. Mail, postage prepaid to Catherine Peek McEwen, Esquire, P.O. Box 3355, Tampa, FL 33601-3355, on the 9th day of August, 2002.

Attorney